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No. 10-847

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In The
Supreme Court of the United States

WILLIAM THADDEUS TURNER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Whether *Atkins v. Virginia*, 536 U.S. 304 (2002), and the Eighth and Fourteenth Amendments to the United States Constitution permit the Supreme Court of Florida's imposition of a bright-line requirement that a capital defendant must have an intelligence quotient of 70 or below for the capital defendant to receive an evidentiary hearing to determine whether the capital defendant is mentally retarded.

2. Whether *Atkins v. Virginia*, 536 U.S. 304 (2002), and the Eighth and Fourteenth Amendments to the United States Constitution require a court to determine whether a capital defendant was mentally retarded at the time of the capital defendant's offense, rather than at the time the trial court determines the capital defendant's mental retardation status decades later.

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AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) 12

APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 47 (4th ed. 2000) 12, 16, 34

Graham Baker, *Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature*, 9 SCHOLAR 237 (2007) 19

John H. Blume, Sheri Lynn Johnson, & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, CORNELL, 18 J.L. & PUB. POL'Y 689 (2009) 6

LaJuana Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297 (2003) 19

J.W. Ellis, *Mental Retardation and the Death Penalty: A Guide to Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11 (2003) 12

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Caroline Everington & Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. FORENSIC PSYCHOL. PRACT. 14 (2008) 33

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OPINIONS BELOW

This petition (the "petition") seeks a writ of certiorari with respect to the Supreme Court of Florida's order entered September 28, 2010, denying William Thaddeus Turner's ("Turner" or "petitioner") appeal brought pursuant to article V, section 3(b)(1) of the Florida Constitution. That order is available at *Turner v. State*, No. SC09-1957, 2010 WL 3802538 (Fla. Sept. 28, 2010), and appears in the appendix to this petition. App. 1-3. The underlying decision of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, is unreported. It is known as *State v. Turner*, Case No. 16-1984-CF-6504-AXXX-MA (Fla. Cir. Ct., 4th Jud. Cir. Sept. 14, 2009). It too appears in the appendix. App. 4-10.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a) because it concerns a final judgment or decree rendered by the highest court of the State of Florida that (1) conflicts with a decision of this Court on a matter of federal law; (2) conflicts with the decisions of the highest courts of two or more states on a federal question; and (3) concerns constitutional principles established by this Court that are subject to continuing controversy and litigation in both state and federal courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Eighth and Fourteenth Amendments to the United States Constitution, as well as section 921.137(1) of the Florida Statutes. The pertinent text of those authorities is as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

> (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more

> standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

FLA. STAT. § 921.137(1) (2006).

STATEMENT OF THE CASE

Turner is a capital inmate, sentenced to death and awaiting execution. Turner filed a motion to vacate his death sentence on the ground that he is mentally retarded. A Florida circuit court issued an order summarily denying Turner's motion without an evidentiary hearing. App. 4-10. Turner appealed that order to the Supreme Court of Florida. The Supreme Court of Florida affirmed the circuit court's summary denial. App. 1-3.

Turner was thus denied the opportunity to present evidence proving that he was mentally retarded at the time of the commission of the offense for which he was sentenced to death. The Florida circuit court's rationale for refusing Turner an evidentiary hearing was that court-ordered testing showed that Turner

currently has an intelligence quotient ("IQ") over 70. Thus, under the Supreme Court of Florida's bright-line requirement that a capital defendant must have an IQ of 70 or below to be considered mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002), Turner's claim could be summarily denied without an evidentiary hearing.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the execution of mentally retarded individuals violates the Eighth Amendment's prohibition against cruel and unusual punishment. The *Atkins* Court charged the states with crafting determinative rubrics to properly vet mentally retarded individuals and prevent their execution. As this Court stated in *Bobby v. Bies*, 129 S. Ct. 2145 (2009), *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*'s compass].' We '[e]ft to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Id.* at 2150.

The Florida statute governing the imposition of the death sentence upon a defendant with mental retardation requires that a capital defendant show "significantly subaverage general intellectual functioning" for the capital defendant to prove that he or she was mentally retarded. This statute defines "significantly subaverage general intellectual functioning" to mean "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services." FLA. STAT. § 921.137(1) (2006). In *Cherry v. State*, 959

So. 2d 702 (Fla. 2007), the Supreme Court of Florida interpreted section 921.137(1) to require a capital defendant to prove that his IQ score meets a strict cutoff score of 70 or below. *Id.* at 713-14.

Yet, according to *Atkins*, the scientifically accepted typical cutoff IQ score for the intellectual function prong of the mental retardation determination is 70 to 75. In *Bies*, this Court discussed *Atkins* and noted Ohio's rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70. *Bies*, 129 S. Ct. at 2150. This Court observed in *Bies* that IQ tests are one of the many factors that need to be considered in determining mental retardation, but that IQ tests alone are not sufficient to make a final determination of mental retardation. *Id.*

The Supreme Court of Florida's bright-line IQ metric is unconstitutional, it was implicitly rejected in *Atkins*, and this Court's observation in *Bies* further illustrates its unconstitutionality. As this Court noted in *Atkins*, individuals with IQ scores of 71 or higher can be mentally retarded. Although a bright-line IQ score cutoff may appear to be a neat and quick solution for appellate courts facing life-and-death questions revolving around definitions of mental retardation, the wholesale rejection of Turner's *Atkins* claim based solely on Turner's current IQ score is unconstitutional and contrary to this Court's holding in *Atkins*.

The issue of whether Florida's bright-line IQ metric is constitutional is ripe for review by this Court. There is genuine and widespread confusion in state and federal courts across the country as to

whether a bright-line metric, such as Florida's, is constitutional. Several states have adopted a bright-line IQ metric, yet others have specifically and emphatically rejected a bright-line IQ metric as unconstitutional under *Atkins*. Scholars have noted this national jurisprudential confusion. *See, e.g.*, John H. Blume, Sheri Lynn Johnson, & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, CORNELL, 18 J.L. & PUB. POL'Y 689, 691-92 (2009) (noting the unconstitutionality of Florida's bright-line metric); Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 TENN. L. REV. 685, 685 (2009) (noting that this court in *Atkins* "declined to establish . . . a uniform definition of mental retardation . . . instead deferring the matter to the individual states. This court's deferral has resulted in an incongruity with a perverse result: The Eighth Amendment takes on different meanings in different states.").

Florida's bright-line approach permits the execution of individuals who are exempt from the death penalty under *Atkins*. Florida cannot constitutionally require that a capital defendant demonstrate that the capital defendant has a current IQ score of 70 or below as a necessary condition precedent for the capital defendant to receive an evidentiary hearing on whether the capital defendant is mentally retarded. This Court has acknowledged that individuals with IQ scores of over 70 can be mentally retarded. Unlike

Ohio's rebuttable presumption mentioned by this Court in *Bies*, Florida's bright-line determination is neither rebuttable nor constitutional.

Thus, the Supreme Court of Florida has crafted a determinative rubric that runs afoul of *Atkins*, the Eighth and Fourteenth Amendments to the United States Constitution, the decisions of the highest courts of several states, and clinical definitions of mental retardation established by the mental health profession. Were Turner a capital inmate in, for example, Ohio, Arkansas, Louisiana, or California, he would be entitled to an evidentiary hearing to determine whether he was mentally retarded at the time of the commission of his crime. Yet the mentally-retarded Turner may be executed by the State of Florida without such a hearing.

Moreover, according to both the Supreme Court of Florida and the Florida circuit court that denied Turner's request for an evidentiary hearing, the relevant time to measure Turner's IQ for *Atkins* purposes was long after his commission of the crime for which Turner was sentenced to death. Even if the Supreme Court of Florida's bright-line IQ metric were constitutional, the Supreme Court of Florida erred in failing to recognize that Turner's IQ at the time of the commission of his crime for which he received a death sentence is the IQ score relevant to an *Atkins* analysis.

For an evaluation of the intellectual and adaptive functioning of a capital defendant to make any sense at all under *Atkins*, a valid assessment of mental and

behavioral functioning must include the time when culpability attached – when the crime was committed. The Supreme Court of Florida's holding that the chronology is different – and that the relevant time to consider Turner's IQ was 24 years after the commission of his crime and 45 years after Turner's eighteenth birthday – is wholly inconsistent with *Atkins*. This chronologically illogical approach is unconstitutional, and does not comport with this Court's holding in *Atkins*. This Court should address the issues raised in this petition, resolve the conflicts that currently exist in the lower state and federal courts, and clarify its holding in *Atkins*.

Turner raised these constitutional issues both in the trial court and upon appeal to the Supreme Court of Florida. Turner raised the issues in the trial court in: (1) his motion to vacate his death sentence based on *Atkins* – a motion entitled "Amended Motion to Vacate Death Sentence Pursuant to Rule 3.203," filed August 21, 2006 (Record on Appeal, Vol. I, pp. 92-110, at pp. 96-98); (2) his response, filed May 8, 2009, to the State of Florida's motion for a summary denial of Turner's *Atkins* motion (Record on Appeal, Vol. II., pp. 705-13, at pp. 708-10); (3) his response, filed July 6, 2009, to the State of Florida's amended motion for a summary denial of Turner's *Atkins* motion (Record on Appeal, Vol. VI, pp. 906-22, at pp. 908-16); and (4) the hearing held July 22, 2009, on the State of Florida's amended motion for a summary denial of Turner's *Atkins* motion (Record on Appeal, Supp. Vol. I, pp. 52-76, at pp. 63-69). In its order granting the

State's motion and summarily denying Turner's *Atkins*'s claim, the trial court rejected Turner's arguments but did not expressly address them. Record on Appeal. Vol. VIII, pp. 1307-13; App. 4-10.

In the Supreme Court of Florida, Turner raised these issues in: (1) his initial brief filed on January 20, 2010 (Initial Brief at 36-66); and (2) his reply brief filed on March 30, 2010 (Reply Brief at 5-18). The Supreme Court of Florida rejected Turner's arguments by affirming the trial court, but the supreme court did not expressly address those arguments. *Turner*, 2010 WL 3802538 at *1; App. 1-3.

ARGUMENT

Atkins left to the states the task of developing methods, consistent with *Atkins*, to vet mentally retarded individuals in order to prevent their execution. It did not give the highest courts of the various states carte blanche authority to create bright-line tests for mental retardation that are inconsistent with both *Atkins* and clinical definitions of mental retardation established by the mental health profession. This petition presents life-and-death questions of federal constitutional law arising from the *Atkins* decision. The Supreme Court of Florida has crafted a bright-line test for mental retardation that conflicts both with this Court's decision in *Atkins* and with the decisions of several other state courts of last resort.

This Court should grant this petition and resolve these conflicts.

I. THE SUPREME COURT OF FLORIDA'S BRIGHT-LINE REQUIREMENT THAT A CAPITAL DEFENDANT MUST HAVE AN IQ OF 70 OR BELOW FOR THE CAPITAL DEFENDANT TO RECEIVE AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE CAPITAL DEFENDANT IS MENTALLY RETARDED IS UNCONSTITUTIONAL AND CONTRARY TO *ATKINS*

A. The Supreme Court of Florida's decisions in *Cherry* and *Nixon* held that an individual with an IQ over 70 cannot be mentally retarded, yet this Court recognized in *Atkins* that an individual with an IQ over 70 can be mentally retarded.

Section 921.137(1) of the Florida Statutes governs the imposition of the death sentence upon a defendant with mental retardation, and requires that a capital defendant show "significantly subaverage general intellectual functioning" for the capital defendant to prove that he or she was mentally retarded. FLA. STAT. § 921.137(1) (2006). This statute defines "significantly subaverage general intellectual functioning" to mean "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the

rules of the Department of Children and Family Services." *Id.*[1]

In *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), the Supreme Court of Florida interpreted section 921.137(1) to require a capital defendant to prove that his or her IQ score meets a strict cutoff score of 70 or below for the capital defendant to be considered mentally retarded under *Atkins*. *Cherry*, 959 So. 2d at 711-14. The Supreme Court of Florida held that "Cherry does not meet the first prong of the mental retardation determination [under section 921.137 because] Cherry's IQ score of 72 does not fall within the statutory range for mental retardation." *Id.* at 714.

The Supreme Court of Florida asserted that its interpretation of the Florida statute was permissible because, in *Atkins*, this court "left to the states the task of setting specific rules in their determination statutes." *Id.* at 713 (citing *Atkins*, 536 U.S. at 317). In *Nixon v. State*, 2 So. 3d 137 (Fla. 2009), the Supreme Court of Florida reiterated its position that "[w]e have consistently interpreted [section 921.137(1)]

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[1] The staff analysis preceding section 921.137 states: "The Department of Children and Family Services does not currently have a rule. Instead the department has established criteria favoring the nationally recognized Stanford-Binet and Wechsler Series tests. In practice, two or more standard deviations from these tests mean that the person has an IQ of 70 or less, although it can be extended up to 75." SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SENATE BILL 238, at 2 (Fla. 2001).

to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below." *Id.* at 142.

In *Atkins*, this Court accurately defined mental retardation in accord with the consensus in the scientific community. *See Atkins*, 536 U.S. at 309 n.3 (quoting the definition of the AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) and the APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)). As noted by this Court in *Atkins*, the consensus in the scientific community recognizes that an "IQ score between 70 and 75 or lower" is "typically considered the cutoff score for the intellectual function prong." *Atkins*, 536 U.S. at 309 n.5 (quoting B. SADOCK & V. SADOCK, COMPREHENSIVE TEXT BOOK OF PSYCHIATRY 2952 (7th ed. 2000)).

Atkins expressly extended to all defendants who fall within the range of "mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317. Accordingly, states are free to adopt definitions of mental retardation that vary in wording and procedure. What states cannot do – at least constitutionally – is "adopt a definition that encompasses a smaller group of defendants." J.W. Ellis, *Mental Retardation and the Death Penalty: A Guide to Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 12 (2003).

This Court's statement that the states are permitted to "develop[ ] appropriate ways to enforce the

constitutional restriction upon [their] execution of sentences," *Atkins*, 536 U.S. at 317, does not permit states to establish state-specific substantive definitions of mental retardation that are wholly inconsistent with both *Atkins* and science.

A similarly-flawed Florida statute led to this Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986). In *Ford*, the Florida statute at issue required that, when informed that a person under sentence of death may be insane, the Governor of Florida would appoint a commission of three psychiatrists to examine the prisoner's sanity. *Id.* at 412. That procedure was the exclusive means for determining sanity and did not permit an evidentiary hearing or a jury trial. *Id.* This Court stated that

> consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate.

Id. at 414. The situation in *Ford* is analogous to that at hand – yet here, the Supreme Court of Florida, rather than the Florida legislature, has developed a quick-and-dirty procedure that precludes a capital defendant from presenting evidence relevant to his or her mental state.

Recently, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court held that the test applied by the United States Court of Appeals for the Fifth Circuit to

assess a Texas prisoner's competency to be executed was based on a flawed interpretation of *Ford*. *Id.* at 959-60. The Court of Appeals's three-factor inquiry for determining whether a prisoner is aware of the reason for his execution erroneously treated a prisoner's delusional belief system as irrelevant and disregarded clinical evidence of the prisoner's psychological dysfunction. *Id.* at 958-60. This Court held that "[t]o refuse to consider evidence of this nature is to mistake *Ford's* holding and its logic." *Id.* at 960. The *Panetti* decision is applicable to Turner's situation – under *Ford*, Turner must be allowed to present evidence showing that he was mentally retarded.

While *Atkins* allowed the states to develop appropriate ways to enforce the constitutional restrictions of the Eighth Amendment, *Ford* and *Panetti* counsel that the Eighth Amendment also restricts states' ability to establish procedures that allow the factfinder to willfully ignore relevant evidence of mental retardation. *See id.* at 955-60. Accordingly, the Supreme Court of Florida's requirement that a capital defendant prove that his or her IQ score meets a strict cutoff score of 70 or below – which was applied to Turner – violates the clear dictates of *Atkins* and is unconstitutional under the Eighth and Fourteenth Amendments.

B. Bright-line IQ cutoffs for determining mental retardation have been rejected by the mental health profession, and there is a national consensus that individuals with IQ scores over 70 can be mentally retarded.

The norms and standards established by the professional organizations in the field of mental retardation that this Court relied on *Atkins* have unequivocally rejected a bright-line cutoff for determining mental retardation. It is a universally recognized fact that some individuals who score 70 or above on IQ tests are mentally retarded. Therefore, these individuals cannot constitutionally be executed under *Atkins*.

The two organizations on which this Court principally relied in *Atkins* – the American Association on Mental Retardation (AAMR) (now known as the American Association on Intellectual and Development Disabilities (AAIDD))[2] and the American Psychiatric Association (APA) – are united on this point. "It is clear that neither of these organizations intends for a fixed cutoff point for making a diagnosis of mental retardation." AAMR, MENTAL RETARDATION:

[2] Consistent with the modern trend, AAIDD now uses "intellectual disability" or the abbreviation "ID" instead of the former terms "mental retardation" or "MR." The terms are synonymous in substantive meaning, although the term "mental retardation" sometimes carries an undeserved pejorative connotation that is not associated with the term "intellectual disability."

DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 58 (10th ed. 2002). The AAMR (and its successor organization, the AAIDD) have repeatedly stated that individuals with IQ scores of "approximately 70 to 75" can be mentally retarded. *Id.*

> The 2002 AAMR System indicates that the SEM [standard error of measurement] is considered in determining the existence of significant subaverage intellectual functioning. In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error.

Id. at 58-59;[3] *see also* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-42 (4th ed. 2000) ("Thus it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

An IQ score "is most accurately understood not as a precise score but as a range of confidence with parameters of at least one [standard error of measurement]. This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation." AAMR, MENTAL RETARDATION: DEFINITION,

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[3] "The standard error of measurement is a statistical term that describes the extent to which a test taker's observed score on any single test administration might differ from his or her 'true' ability." *Russo v. Pearson, Inc. v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 992 n.1 (D. Minn. 2006).

CLASSIFICATION, AND SYSTEMS OF SUPPORTS 57 (10th ed. 2002).

> The assessment of intellectual functioning through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement. An obtained IQ score must always be considered in terms of the accuracy of its measurement.

Id. The relevant authorities in this field unambiguously hold that imposing a "cutoff" IQ score of 70 is indefensible. In that regard, the most recent authoritative source in the mental retardation area, the 2010 edition of *Intellectual Disability* published by AAIDD (formerly AAMR) states as follows:

> Determining a Cutoff Score
>
> The significant limitations in intellectual functioning criterion for a diagnosis of [mental retardation] is an IQ score of approximately two standard deviations below the mean, considering the standard error of measurement for the specific instruments used and the instruments' strengths and limitations. It is clear from this significant limitations criterion used in the *Manual* that AAIDD (just as the American Psychiatric Association, 2000) *does not intend for a fixed cutoff point to be established for making the diagnosis of [mental retardation]*. Both systems (AAIDD and APA) require clinical judgment regarding how to interpret possible measurement error. Although a fixed cutoff

> for diagnosing an individual as having ID is not intended and cannot be justified psychometrically, it has become operational in some states (Greenspan & Switzky, 2006). It must be stressed that the diagnosis of [mental retardation] is intended to reflect a clinical judgment rather than an actuarial determination. *A fixed cutoff score for ID is not psychometrically justifiable.*

AAIDD, INTELLECTUAL DISABILITY 39-40 (11th ed. 2010) (emphasis added).

Thus, the fixed cutoff adopted by the Supreme Court of Florida is not a psychometrically justifiable – or constitutional – approach for assessing mental retardation. Contrary to *Atkins*, the Supreme Court of Florida's approach permits the execution of mentally retarded capital defendants – such as Turner.

C. IQ scores, taken in isolation, are insufficient to determine whether an individual is mentally retarded.

IQ scores vary, and they are sensitive to external factors. Thus, as *Atkins* intimated, a court cannot constitutionally rely solely on an IQ score to determine whether an individual is mentally retarded when that individual's life is at stake. The administration "of an IQ test involves literally hundreds of judgment calls" on the part of the test administrator. Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211, 1232 (2007).

The AAMR has amended its definition of mental retardation ten times since 1908 to "minimize the importance of IQ as a factor in diagnosis and emphasize adaptive behavior." Graham Baker, *Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature*, 9 SCHOLAR 237, 264-65 (2007). Courts that "rely on test scores as indications of mental retardation should be aware that they may be placing their faith in the results of mental retardation measurements that were never intended to be used in a legal context." LaJuana Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297, 312 (2003).

The AAMR makes clear that an assessment of adaptive functioning is a critical and necessary component of the determination and that it is no less important than IQ score:

> Adaptive behavior should not be viewed as separate from and subservient to an IQ deficit. . . . What is assessed should tap more than the academic realm of intelligence and reflect the practical and social abilities.

AAMR MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 33 (10th ed. 2002). In fact, there is a movement within the profession to deemphasize IQ and to place more importance on "assessment of social, practical, and conceptual intelligence" to "reflect realistic situations met within community environments that require complex decision-making." *Id.* "[A]ssessment to identify people

with mental retardation needs to be reconceptualized to reflect actual problems of adaptation in daily functioning faced by those with mild mental retardation." MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 34 (10th ed. 2002).

The Supreme Court of Florida's use of a specific IQ score as a necessary condition precedent to a finding of mental retardation deprives defendants such as Turner of the more complete and comprehensive assessment required by *Atkins* and advocated by the mental health profession. Increasingly, the mental health profession cautions against the Supreme Court of Florida's approach:

> Intelligence, as measured by IQ, has predominated as the primary criterion for diagnosing mental retardation. Although some professionals in the field have recommended the return to a definition based only on IQ, others fervently urge that reliance on IQ be reduced and that measures of intelligence reflect the concept more broadly than simply IQ.

MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 25 (10th ed. 2002).

The determination of whether a person has significantly subaverage general intellectual functioning is much more complex than merely looking at an IQ score. As explained by the AAMR:

> Intelligence is a general mental capability. It includes reasoning, planning, solving

> problems, thinking abstractly, comprehending complex ideas, learning quickly and learning from experience. [citations omitted.] As reflected in this definition, intelligence is not merely book learning, a narrow academic skill, or test-taking smarts. Rather, it reflects a broader and deeper capacity for comprehending our surroundings, catching on, making sense of things, figuring out what to do. Thus, the concept of intelligence represents an attempt to clarify, organize, and explain the fact that individuals differ in their ability to understand complex ideas, to adapt effectively to their environments, to learn from experience, to engage in various forms of reasoning, to overcome obstacles by thinking and communicating.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 40 (10th ed. 2002). The Supreme Court of Florida's bright-line standard does not include within its ambit individuals who are mentally retarded (and thus cannot constitutionally be subjected to capital punishment), but who happen to score above 70 on standardized IQ tests. As this Court noted in *Bies*, IQ tests are one of the many factors that need to be considered in determining mental retardation, but IQ tests alone are not sufficient to make a final determination of mental retardation. *Bies*, 129 S. Ct. at 2150.

D. There is continuing and considerable controversy in both state and federal courts regarding whether a state may impose a bright-line mental retardation IQ cutoff under *Atkins*.

There is considerable confusion among, and within, the state and federal courts as to whether a bright-line IQ cutoff is constitutionally permissible under *Atkins*. That confusion has resulted in widely varying substantive definitions of mental retardation, some of which permit the execution of mentally retarded individuals.

For example, the Supreme Court of Alabama (like the Supreme Court of Florida) has adopted a bright-line mental retardation IQ cutoff of 70 – yet the federal district court in Alabama noted that the

> Alabama Supreme Court's specification of "an IQ of 70 or below" as the line dividing mentally retarded individuals from the remainder of the population is *not found* in: (a) the Alabama Retarded Defendant Act . . . ; (b) the *Atkins* decision (observing that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," 536 U.S. at 309 n.5, 122 S. Ct. 2242); or (c) AAMR and APA diagnostic criteria.

Thomas v. Allen, 614 F. Supp. 2d 1257, 1273 n.44 (N.D. Ala. 2009) (emphasis in original), *aff'd*, 607 F.3d 749 (11th Cir. 2010). The federal district court in

Alabama correctly noted that "it is clear that neither of the professional organizations dedicated to the diagnosis and treatment of mental deficiencies advocates a fixed, finite IQ 'cut score' as an impregnable barrier, separating persons who are mentally retarded from those who are not." *Id.* at 1272.

The highest courts of Tennessee and Kentucky also impose bright-line IQ cutoffs, as do the highest courts of several other states. *See State v. Locklear*, 681 S.E.2d 293, 310-11 (N.C. 2009); *Pizzuto v. State*, 202 P.3d 642, 650-51 (Idaho 2008); *Blonner v. State*, 127 P.3d 1135, 1138-39 (Okla. Crim. App. 2006); *Bowling v. Commonwealth*, 163 S.W.3d 361, 376 (Ky. 2005); *Howell v. State*, 151 S.W.3d 450, 456 (Tenn. 2004); *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated on other grounds*, 544 U.S. 901 (2005). The Supreme Court of Mississippi's mental-retardation rubric utilizes a bright-line IQ cutoff of 75, rather than 70. *Chase v. State*, 873 So. 2d 1013, 1029 n.20 (Miss. 2004).

The United States Court of Appeals for the Sixth Circuit, presiding over Tennessee and Kentucky, noted the potential unconstitutionality of Kentucky's bright-line requirement, and in a dissenting opinion, Judge Moore noted that "there appears to be considerable evidence that irrebuttable IQ ceilings are inconsistent with current generally-accepted clinical definitions of mental retardation" and that "[w]hile it is true that *Atkins* vests states with the primary responsibility for defining mental retardation, states are not wholly unfettered in this process. Rather,

states must adopt mental-retardation definitions and procedures for ascertaining a defendant's mental capacity that are in accordance with the Eighth Amendment's goals and principles." *In re Bowling*, 422 F.3d 434, 442-43 (6th Cir. 2005) (Moore, J., dissenting).

As *Allen* and the dissent in *Bowling* illustrate, there are considerable conflicts between state and federal courts regarding these life-and-death issues of constitutional law. There are also conflicts in the lower federal courts regarding whether the federal death penalty requires a bright-line IQ cutoff. *See* 18 U.S.C.A. § 3596(c) (2006) ("[a] sentence of death shall not be carried out upon a person who is mentally retarded. . . ."); *compare United States v. Davis*, 611 F. Supp. 2d 472, 482-90 (D. Md. 2009) (recognizing that a defendant with IQ scores over 70 can still be found mentally retarded under 18 U.S.C. § 3596(c)), *and United States v. Nelson*, 419 F. Supp. 2d 891, 894-95 (E.D. La. 2006) (noting that a defendant must have an IQ score of "approximately 70 or below" to be found mentally retarded under 18 U.S.C. § 3596(c)), *with United States v. Cisneros*, 385 F. Supp. 2d 567, 570-72 (E.D. Va. 2005) (holding that a defendant must have an IQ score of 70 or below to be found mentally retarded under 18 U.S.C. § 3596(c)).

The highest courts of many states also disagree strongly and emphatically on the question of whether a bright-line IQ cutoff is constitutionally permissible under *Atkins*.

As this Court previously noted, Ohio's highest court adopted a rebuttable presumption that an individual is not mentally retarded if his or her IQ score is above 70. *Bies*, 129 S. Ct. at 2150. The highest court of Arkansas adopted a rebuttable presumption of mental retardation when a defendant has an IQ of 65 or under, and other states' highest courts have adopted presumptions of mental retardation that are tethered to specific IQ scores. *Coulter v. State*, 227 S.W.3d 904, 908 (Ark. 2006); *see also State v. Grell*, 135 P.3d 696, 700 n.5 (Ariz. 2006). These rebuttable presumptions are constitutionally permissible.

Louisiana's highest court rejected any bright-line mental retardation IQ cutoff. *See State v. Dunn*, 41 So. 3d 454, 470 (La. 2010) ("it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded. . . ."). Missouri's highest court rejected any bright-line cutoff, and noted that individuals with an IQ score over 70 can be mentally retarded. *See State v. Johnson*, 244 S.W.3d 144, 153 (Mo. 2008). The Texas Court of Criminal Appeals, the highest Texas state court for appeals resulting from criminal cases, held that "sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded" for *Atkins* purposes. *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004).

The Illinois Supreme Court did not adopt a bright-line approach, and specifically noted this Court's statement in *Atkins* that individuals with IQ scores of 70 to 75 can be mentally retarded. *See People v. Pulliam*, 794 N.E.2d 214, 236 (Ill. 2002).

The Nebraska Supreme Court noted that individuals with IQ scores above 70 can be mentally retarded under *Atkins*. *State v. Vela*, 777 N.W.2d 266, 306-07 (Neb. 2010).

The California Supreme Court explicitly refused to adopt a bright-line IQ cutoff, and explained:

> With respect to the intellectual prong of [California's mental retardation statute], respondent Attorney General urges this court to adopt an IQ of 70 as the upper limit for making a prima facie showing. We decline to do so for several reasons: First, unlike some states, the California Legislature has chosen not to include a numerical IQ score as part of the definition of mentally retarded . . . Moreover, statutes referencing a numerical IQ generally provide that a defendant is presumptively mentally retarded at or below that level, rather than – as respondent impliedly argues – that a defendant is presumptively not mentally retarded above it. Second, a fixed cutoff is inconsistent with established clinical definitions and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing. Experts also agree that an IQ score below 70 may be anomalous as to an individual's intellectual functioning and not indicative of mental impairment. Finally, IQ test scores are insufficiently precise to utilize a fixed cutoff in this context.

In re Hawthorne, 35 Cal. 4th 40, 48-49 (2005) (citations and footnotes omitted); *see also People v. Superior Court*, 40 Cal. 4th 999, 1003 (2007) (The fact that defendant's IQ score "has generally been above the range considered to show mental retardation does not, as a matter of law, dictate a finding he is not mentally retarded. The legal definition of mental retardation for purposes of *Atkins*'s constitutional rule does not incorporate a fixed requirement of a particular test score.").

The highest courts of Indiana and Pennsylvania have also refused to adopt a bright-line cutoff. *See Pruitt v. State*, 834 N.E.2d 90, 109-10 (Ind. 2005) (statute defining mental retardation was not to be interpreted to contain diagnostic criteria below the clinical standards because, in part, "the Eighth Amendment must have the same content in every state."); *Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005) ("consistent with both [the AAMR and the DSM] classification systems, we do not adopt a cutoff IQ score for determining mental retardation in Pennsylvania, since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.").

Other states' highest courts use holistic determinations that do not incorporate bright-line cutoffs or presumptions. *See State v. Locklear*, 681 S.E.2d 293, 310-14 (N.C. 2009); *State v. Ross*, 269 Conn. 213, 344 (2004); *People v. Vasquez*, 84 P.3d 1019, 1022-23 (Colo. 2004); *State v. Laney*, 627 S.E.2d 726, 730-32 (S.C. 2006); *Head v. Hill*, 587 S.E.2d 613, 618-23 (Ga.

2003); *State v. Hawkins*, No. CRIM.A.IN03101154RI, 2008 WL 484446 at *2 (Del. Super. Feb. 20, 2008), *aff'd*, 968 A.2d 491 (Del. 2009); NEV. REV. STAT. § 174.098 (2009).

One academician who surveyed state statutory developments following the *Atkins* decision observed that

> many states have incorporated a specific IQ cutoff score in their definitions of mental retardation, most often using an IQ of seventy as the cutoff for this component of the mental retardation definition. However, most of these definitions do not acknowledge that each assessment instrument has a standard measurement error, usually between three and five points, and that the standard measurement error is not the same for all instruments. Recognizing the impact of the standard measurement error, in the previous AAMR definitions and the current APA definition, the IQ cutoff for mental retardation has been quantified between seventy and seventy-five, as noted by this court in *Atkins*. To avoid mistaken reliance on and potential misuse of a particular IQ score, especially if it does not include consideration of standard measurement error, the AAMR stated its current IQ cutoff in terms of being at least two standard deviations below the mean of the specific instruments used, considering their particular standard measurement error, strengths, and limitations. The current APA definitional material also refers to the

> IQ cutoff as being approximately two standard deviations below the mean, with reference to measurement error of approximately five points. *Thus, any state's use of a fixed IQ cutoff score, without reference to standard measurement error and other factors concerning the specific instrument used, risks an inaccurate assessment of the intellectual functioning component of the mental retardation definition.*

Allen, 614 F. Supp. 2d at 1274-75 (citing Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution,* 30 J. LEGIS. 77, 95-96, 139 (2003) (emphasis added, footnote omitted)) ("[S]tates that use a rigid IQ cutoff score of seventy for the intellectual functioning component may be excluding some individuals otherwise falling within the accepted clinical definition.").

There is a great deal of confusion as to whether *Atkins* permits a bright-line mental retardation IQ cutoff. The highest courts of these United States have adopted conflicting standards on this life-and-death issue, all of which revolve around the interpretation of *Atkins*. This court should grant this petition to clarify its holding in *Atkins* and eschew obfuscation.

II. UNDER *ATKINS* AND THE EIGHTH AMENDMENT, THE RELEVANT TIME OF DETERMINATION OF A CAPITAL DEFENDANT'S IQ IS AT THE TIME OF THE COMMISSION OF THE CRIME

One of the principal errors that the Florida circuit court made in its ruling was that it exclusively focused on Turner's current IQ, rather than his IQ at the time of the commission of his crimes. Under *Atkins*, it is the latter, not the former, that is the relevant factor in determining whether a capital defendant was sufficiently mentally retarded to be constitutionally exempt from a death sentence. The Supreme Court of Florida's view to the contrary represents an incorrect and unconstitutional application of *Atkins*.

This Court's rationale in *Atkins* clearly applies to a defendant's level of functioning at the time of the offense. *Atkins* is predicated on the reduced personal culpability of mentally retarded persons. As this Court explained:

> Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes, and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated

> plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 317-18; *see also Dickerson v. Bagley*, 453 F.3d 690, 699 (6th Cir. 2006); *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1345-46 (N.D. Ala. 2006), *aff'd*, 555 F.3d 1346 (11th Cir. 2009); *State v. Trujillo*, 206 P.3d 125, 134 (N.M. 2009); *Woods v. State*, 863 N.E.2d 301, 304 (Ind. 2007).

These disabilities impair the ability of a mentally retarded person to "act with the level of moral culpability that characterizes the most serious adult criminal conduct" for which the death penalty is deemed acceptable. *Atkins*, 536 U.S. at 306, 311 (noting that punishment should be proportional to the offense). This Court pointed out the inconsistency of imposing the death penalty on a mentally retarded criminal when the culpability of the average murderer does not warrant the death penalty. *Id.* at 319.

This Court further emphasized that justifications for the death penalty such as "retribution and deterrence of capital crimes" simply do not apply to mentally retarded persons. *Id.* at 318-19 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). Because the impairments of mentally retarded persons render them unable to act with the high level of culpability required for imposition of the death penalty, society has no reasonable interest in seeing the death penalty imposed on the mentally retarded.

The same impairments that make the mentally retarded less morally culpable also reduce their ability to reason in the ways necessary to control their behavior based on the possibility of execution. *Id.* at 320. Capital punishment is an effective deterrent "only when murder is the result of premeditation and deliberation." *Id.* at 319 (citing *Enmund v. Florida*, 458 U.S. 782, 799 (1982)). Therefore, the execution of offenders who are incapable of these reasoning processes does not further society's interest in the deterrence of capital crimes. *Id.* at 320 ("Executing the mentally retarded will not measurably further the goal of deterrence.").

Several state courts considering the question have correctly determined that *Atkins* "clearly implied that a defendant must be mentally retarded at the time the crime is committed for the Eighth Amendment bar to apply. . . . It is without doubt that the factors leading to the ultimate determination in *Atkins* were centralized upon the characteristics of the mentally retarded offender at the time of the offense. . . ." *Coleman v. State*, No. W200702767CCAR3PD, 2010 WL 118696 at *29-30 (Tenn. Crim. App. Jan. 13, 2010); *see also Pizzuto v. State*, 202 P.3d 642, 654 (Idaho 2008); *State v. Ross*, 269 Conn. 213, 344 (2004) (holding that the Connecticut statute governing mental retardation determinations in capital cases "requires that the impairment to the defendant's mental capacity exist 'at the time of the offense.'").

Despite these teachings of *Atkins*, the Florida circuit court held, and the Supreme Court of Florida

affirmed, that Turner's current level of intellectual function, as assessed more than 24 years after his offense and more than 45 years after his eighteenth birthday, required a summary denial of Turner's request for an evidentiary hearing. This holding was inconsistent with the societal interests and concepts of *Atkins*'s constitutional underpinnings.

For an evaluation of the intellectual and adaptive functioning of a criminal defendant to make any sense at all under *Atkins*, a valid assessment of mental and behavioral functioning must include the time when culpability attached – when the crime was committed. *See, e.g.*, Caroline Everington & Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. FORENSIC PSYCHOL. PRACT. 14 (2008) ("For the Court's reasoning to apply, these impairments associated with mental retardation are presumed to be present at the time of the crime; therefore, an appropriate forensic evaluation must show that mental retardation existed at the time of the crime.").

Atkins makes clear that the Florida circuit court and the Florida Supreme Court erred in focusing exclusively on Turner's current IQ assessments. Consistent with the foregoing, Turner intended to show at an evidentiary hearing that he was mentally retarded at the time of the crimes, irrespective of what current tests may suggest about his current level of intellectual functioning. Turner should have been afforded that opportunity, and the Florida

circuit court erred when it denied Turner an evidentiary hearing.

Turner was, and is, prepared to show that his current IQ scores are not probative of his IQ at the time of his crimes – the crucial time for *Atkins* purposes. IQ scores can and do vary over time, and an individual can improve his or her IQ score over time.

> Mental Retardation is not necessarily a lifelong disorder. Individuals who have Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation.

APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 47 (4th ed. 2000). The Supreme Court of Florida's view punishes inmates such as Turner – not for their crimes – but instead for their efforts at self-education during their lengthy periods of incarceration following their convictions. This view is inconsistent with *Atkins* and public policy. Society has no legitimate interest in punishing inmates because they have managed to educate themselves, or otherwise improve their IQ scores. Accordingly, the evidentiary hearing that Turner sought to have here was consistent with – and mandated by – the law, the facts, science, and the Constitution.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that this Court grant review of this matter.

Respectfully submitted,

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Supreme Court of Florida

TUESDAY, SEPTEMBER 28, 2010

CASE NO.: SC09-1957
Lower Tribunal No(s).: 16-1984-CF-6504

WILLIAM THADDEUS TURNER	vs.	STATE OF FLORIDA
Appellant(s)		Appellee(s)

William Thaddeus Turner, a prisoner under sentence of death, appeals the denial of a motion to vacate his death sentence on the ground that he is mentally retarded. We previously affirmed Turner's conviction and death sentence on direct appeal, *Turner v. State*, 530 So. 2d 45 (Fla. 1987). We also affirmed the denial of his initial motion for post-conviction relief and denied his petition for a writ of habeas corpus. *Turner v. State*, 614 So. 2d 1075 (Fla. 1992). In 2004, relying on *Atkins v. Virginia*, 536 U.S. 304 (2002), Turner filed a motion seeking to vacate his death sentence on the ground that he is mentally retarded. On September 14, 2009, the trial court summarily denied Turner's motion. We affirm.

To prove mental retardation, a defendant must demonstrate: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See* § 921.137(1), Fla. Stat. (2007). To satisfy the first prong, the defendant must establish that he or she has an IQ of two or more standard deviations below the mean. *Cherry v. State*,

959 So. 2d 702, 713 (Fla. 2007). In accordance with Florida Rule of Criminal Procedure 3.203, the trial court appointed two mental health experts to examine Turner. One mental health expert determined that Turner's full-scale IQ was 98, and the other expert determined that Turner's full-scale IQ was 108. Both of these scores fell within the average intelligence range. Because the expert reports conclusively rebutted the first-prong of Turner's *Atkins* claim, the trial court did not err in summarily denying Turner's claim that he was mentally retarded.

Turner also contends on appeal that the trial court erred in denying two motions to disqualify. First, Turner filed a motion to disqualify the trial court in 2004, in which he asserted that the trial court should have been disqualified due to an ex parte communication with the State. The trial court denied the motion. In 2006, Turner filed a petition for review of the trial court's denial. We denied Turner's petition because the motion to disqualify had been untimely. *Turner v. State*, SC06-1359 (Fla. order filed Oct. 12, 2007). Turner is not entitled to relitigate the propriety of the denial of the 2004 motion to disqualify. *See, e.g., Tompkins v. State*, 994 So. 2d 1072, 1083 (Fla. 2008) (denying "attempt to relitigate" claim that sentencing proceeding was unfair as a result of an ex parte communication between the sentencing judge and the prosecutor because the claim had been "already decided adversely to Tompkins"). Second, Turner filed a motion to disqualify filed on February 20, 2009, which was also denied by

the trial court. A motion to disqualify the trial court must be filed "within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion." Fla. R. Jud. Admin. 2.330(e). The most recent trial court conduct cited as a basis for disqualification in the February 20, 2009, motion was the trial court's May 23, 2008, denial of two motions to appear pro hac vice. Turner offered no compelling reason why he could not have filed a motion to disqualify within ten days of the filing of the May 23, 2008, orders. Accordingly, Turner's motion to disqualify was untimely and thus, properly denied.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall [SEAL]
Clerk, Supreme Court

th
Served:

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HON. JIM FULLER, CLERK
HON. JOHN SOUTHWOOD, JUDGE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-1984-CF-6504-AXXX-MA

DIVISION: CR-C

STATE OF FLORIDA,
vs.
WILLIAM T. TURNER,
Defendant.
/

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGEMENT AND SENTENCE PURSUANT TO RULE 3.203

(Filed Sep. 14, 2009)

On November 29, 2004, Turner filed a successive postconviction motion, pursuant to rule 3.203 of the Florida Rules of Criminal Procedure, asserting that he is mentally retarded and therefore, may not be executed in accordance with *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). After several interlocutory appeals, on June 18, 2009, the State filed an amended motion for summary denial of the *Atkins* claim. On July 22, 2009, this Court held a non-evidentiary hearing on the State's amended motion.

This Court appointed two experts in mental retardation to evaluate Turner as required by rule 3.203. One expert concluded Turner's current I.Q. was 98 and the other expert concluded Turner's

current I.Q. was 108. Turner proffered the results of two IQ tests contained in his high school records reflecting scores of 72 and 73. This Court finds that Turner's intellectual functioning is normal based on the two experts' written reports. Turner's *Atkins* claim is meritless. Therefore, the 3.203 motion is denied.

MENTAL RETARDATION

The Florida Supreme Court has explained, "[p]ursuant to both section 921.137 and rule 3.203, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; *and* (3) manifestation of the condition before age eighteen." *Nixon v. State,* 2 So.3d 137, 141 (Fla. 2009).

The first prong of the test for mental retardation is the significantly subaverage general intellectual functioning prong. The Florida Supreme Court has repeatedly held to establish this first critical prong, a defendant must establish he has an IQ of 70 or below, *Nixon,* 2 So.3d at 142 (Fla. 2009) (stating: "[w]e have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below"); *Jones v. State,* 966 So.2d 319, 329 (Fla. 2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below"); *Zack v. State,* 911 So.2d 1190, 1201

(Fla. 2005) (finding that to be exempt from execution under *Atkins,* a defendant must establish that he has an IQ of 70 or below); *Cherry v. State,* 781 So. 2d 1040 (Fla. 2000) (accepting expert testimony that in order to be found mentally retarded, an individual must score 70 or below on an IQ test). The Florida Supreme Court in *Nixon* recently rejected several challenges to its absolute requirement that the defendant's current I.Q. score be 70 or below. This first prong is the critical, threshold prong. The first prong is a threshold, it is only when this first critical prong is met that a court needs to address the other two prongs. *Cherry,* 959 So.2d at 714 (concluding "[b]ecause we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination.").

The rule of criminal procedure governing mental retardation in capital cases, rule 3.203(b), requires "a standardized intelligence test authorized by the Department of Children and Family Services in rule 65B-4.032 of the Florida Administrative Code." Rule 3.203(b), Fla. R. Crim. Pro.[1] The only two IQ

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[1] Rule 65B-4.032 of the Florida Administrative Code was transferred to 65G-4.011. The rule governing that determination of mental retardation in capital felony cases: intelligence tests to be administered, rule 65G-4.011, provides:

> (1) When a defendant convicted of a capital felony is suspected of having or determined to have mental retardation, intelligence tests to determine intellectual functioning as specified below shall be administered by a qualified professional who is authorized in

(Continued on following page)

approved by the Department of Children and Family Services' agency for persons with disabilities are the (1) Stanford-Binet and the (2) Wechsler (WAIS). *Jones*, 966 So.2d at 329 (Fla. 2007) (noting that the WAIS is an approved test).

THE TWO COURT EXPERTS' WRITTEN REPORTS

Pursuant to the rule, this Court appointed two experts in mental retardation as Court experts. Dr. Gregory A. Prichard was appointed at the recommendation of the State and Dr. Daniel Hicky Grant was appointed at the recommendation of the defense. Both experts filed written reports with this Court.

Dr. Prichard examined Turner on July 24, 2008 with opposing counsel, Mr. Lohman, present. (Report at 1). Dr. Prichard administered a WAIS III test and determined Turner's full scale I.Q. is 98. (Report at 1,5). Dr. Prichard's report, dated October 23, 2008, concluded that Turner is not mentally retarded. Dr. Prichard concluded that Turner was "a man with average intellectual capacities."

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accordance with Florida Statutes to perform evaluations in Florida. The test shall consist of an individually administered evaluation, which is valid and reliable for the purpose of determining intelligence. The tests specified below shall be used.

(a) The Stanford-Binet Intelligence Scale.

(b) Wechsler Intelligence Scale.

The other case expert, Dr. Grant, examined Turner on July 17 and 18, 2008 with Mr. Lohman present. (Dr. Grant's report at 1,3). Dr. Grant administered a Stanford Binet Intelligence Scale – 5th ed. test and determined Turner's full scale I.Q. is 108. (Report at 4,5). Dr. Grant's report concluded that Turner is "well within the average range of intelligence." (Report at 5). Dr. Grant noted that there were no significant differences between Turner's verbal score of 109 and Turner's nonverbal score of 107. (Report at 4). Dr. Grant concluded that Turner's performance on the test "places his current intellectual/mental functioning above the level defined as mentally retarded by Florida Rule of Criminal Procedure 3.203(b)." (Report at 5).

Dr. Prichard administered a WAIS III and Dr. Grant administered a Stanford-Binet Intelligence Scale – 5th ed. Both of these are approved I.Q. tests under the rule. This Court considered only these two approved test in its determination of mental retardation.

EVIDENTIARY HEARING

Turner's attorneys requested an evidentiary hearing to establish that he meets the three prongs of the test for mental retardation. There is no need for this Court to address any other prong when the first prong has not been established, The first prong is a threshold prong, it is only when this first critical prong is met that a court needs to address the other

two prongs. *Cherry*, 959 So.2d at 714 (concluding "[b]ecause we find that Cherry does not meet this first prong of the section 921.137(1) criteria, we do not consider the two other prongs of the mental retardation determination."). There is no factual dispute in the critical threshold first prong. There simply is no dispute that is of any legal consequence for this Court to resolve. The record, containing the two experts' reports, conclusively rebut the *Atkins* claim. Therefore, the request for an evidentiary hearing is denied.

FINDNGS OF FACT/CONCLUSIONS OF LAW

Turner does not meet the definition of mental retardation. Rule 3.203(b), Fla. R. Crim. Pro., Turner's full scale I.Q. is 108 according to one expert and 98 according to the other expert. This Court finds that Turner's I.Q. is between 98 and 108. Turner does not have significantly subaverage general intellectual functioning. His I.Q. is significantly above 71. Turner's I.Q. is normal. Turner is not mentally retarded as that term is defined in Florida law. Therefore, *Atkins* does not apply.

Based on the above, it is:

ORDERED AND ADJUDGED that the Defendant's Motion to Vacate Judgement and Sentence Pursuant to Rule 3.203 is **DENIED**.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 11th day of September, 2009.

/s/ John D. Southwood
SENIOR CIRCUIT
COURT JUDGE

Copies to:

181 (2)

No. 10-847

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM THADDEUS TURNER, *Petitioner*,
v.
STATE OF FLORIDA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant review of a claim that the Eighth Amendment mandates a particular definition of mental retardation in a case where the capital defendant's IQ is normal?

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No. 10-847

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM THADDEUS TURNER, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The Florida Supreme Court's opinion denying Turner's claim is an unpublished order available at *Turner v. State*, 2010 WL 3802538 (Fla. September 28, 2010).

JURISDICTION

The Florida Supreme Court's order denying the claim was issued on September 28, 2010. No motion for rehearing was filed. The petition for writ of certiorari was filed on December 27, 2010. The

petition was timely. *See* Sup. Ct. R. 13.1 (. . . a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.); 28 U.S.C. § 2101(c). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution, section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

Florida's imposition of the death sentence upon a defendant with mental retardation prohibited statute, § 921.137(1), Florida Statutes (2010), which provides in part:

> (1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt

> rules to specify the standardized intelligence tests as provided in this subsection.
>
> (2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

STATEMENT OF THE CASE AND FACTS

The facts of this case, as recited by the Eleventh Circuit in its affirmance of the district court's denial of the petition for writ of habeas corpus, are:

> In 1969, Turner married Shirley Hart, a victim in this case, and for more than ten years, they had a loving, harmonious marriage. By 1983, however, their marriage had deteriorated. In February 1984, Shirley decided to leave Turner and take their two young daughters, seven-year old Anetra and five-year old Anita, with her. Shirley and the daughters moved in with Joyce Brown, the other victim in this case, and Joyce's fifteen-year old daughter, Irene Hall.
>
> Turner responded to the separation by spying on Shirley with

binoculars, watching Joyce's house, and peeping into the windows of Joyce's apartment. Turner repeatedly arrived at Joyce's apartment asking to speak to his estranged wife, but Shirley refused to see or talk to him. Joyce informed Turner on several occasions that Shirley did not want to talk to him.

During visits to Joyce's house, Turner threatened to kill both Shirley and Joyce and blamed Joyce for the disintegration of his family. Turner believed that his wife and Joyce were lesbians and prostitutes, who sold drugs and participated in illicit behavior in the presence of his daughters, especially seven-year old Anetra.

At approximately 6:30 a.m. on July 3, 1984, Turner walked to Joyce's apartment. Turner was armed with a large knife and his father's single-shot shotgun, which he obtained without his father's permission. While kneeling on the sidewalk in front of the apartment building, Turner fired the shotgun two or three times into the building, shooting directly into the front door and windows and reloading after each shot.

At trial, Irene testified that she heard the shots and that Shirley ran into Irene's bedroom and "ask[ed] her how to lock the door." Anetra also was

present in Irene's bedroom. Shirley was unable to lock the door, and Turner entered the bedroom carrying the shotgun and the knife. While Irene hid under the bed, Turner pushed Shirley onto the floor, where he stabbed her approximately twenty-two times in the presence of fifteen-year old Irene and seven-year old Anetra. According to the two girls, Turner repeatedly cursed at Shirley as he continually stabbed her, saying: "bitch, I hate you;" "I'm sick and tired of you;" "you won't let me see my kids;" and "[y]ou're the bitch I want."

Anetra attempted to save her mother by beating on her father's back and telling him to stop. Anetra ran out of the room when she heard Joyce call for her. Turner did not say anything to Anetra or Irene and did not react to anything the children said or did. Irene remained under the bed while Turner continued to stab Shirley to death.

After stabbing Shirley, Turner left the apartment building and went to the telephone booth where Joyce was on the phone with the police. As approximately forty people watched, Turner stabbed Joyce repeatedly. Turner pulled Joyce out of the telephone booth by her hair and continued to stab her as she lay on the

ground. Joyce's daughter, Irene, approached a neighbor, handed him a shotgun, and begged the neighbor to shoot Turner. The shotgun, however, was empty; so the neighbor threw rocks at Turner in an attempt to stop the stabbing. Joyce begged Turner not to kill her, but Turner replied, "no, you're the one who kept my family away from me."

The record is in dispute regarding whether Turner ceased stabbing Joyce when a police car passed by the telephone booth. Two witnesses testified that Turner continuously stabbed Joyce despite the fact that a police officer drove by and failed to stop to assist. In contrast, another witness testified that Turner stabbed Joyce a number of times until a police car drove by, and Turner "stood up in a correct position and pretended that there wasn't anything going on." According to this witness, after the police car drove by, Turner started to stab Joyce again. In addition, daughter Irene testified that Turner stabbed her mother, retreated behind a house until the police car passed by the scene, and then returned to the telephone booth to continue the stabbing.

Officers John Venosh, Carlton

> Aikens, and E.L. MacDonald of the Jacksonville Sheriff's Office arrived at the scene shortly after the murders. Turner fled down an alley, and the police officers chased him. According to Officer Venosh, Turner stopped, raised his hands while keeping a knife in his right hand, and then took a step toward the officer. After a momentary standoff, Turner dropped the knife and surrendered to the officers. Officer Venosh testified that Turner immediately stated, "please don't kill me, please don't kill me." As Turner and the officers walked to the patrol car, Turner remarked, "She was f-king up my family, she was f-king up my life." Officer MacDonald described Turner as quiet and not hysterical, noting that Turner "appeared to be in control of himself."
>
> Turner was charged with two counts of first-degree murder for the deaths of Shirley Turner and Joyce Brown.

Turner v. Crosby, 339 F.3d 1247, 1249-1250 (11th Cir. 2003)(footnotes omitted).

On November 29, 2004, Turner filed a motion in state court asserting that he was mentally retarded and therefore, the Eighth Amendment

prohibited his execution. The state trial court appointed two mental retardation experts as required by Florida's rule of criminal procedure, rule 3.203. The trial court appointed Dr. Gregory A. Prichard at the recommendation of the State and Dr. Daniel Grant at the recommendation of the defense.

Dr. Prichard examined Turner on July 24, 2008, with defense counsel, Mr. Lohman, present. (PC Vol. II 202). Dr. Prichard administered a WAIS III test and determined Turner's full scale I.Q. is 98. (PC Vol. II 202, 206-207). Dr. Prichard's written report concluded that Turner was "a man with average intellectual capacities" and did "not meet any of the three criteria for mental retardation." (PC Vol. II 206-207).

Dr. Grant examined Turner on July 17 and 18, 2008, with Mr. Lohman present. (PC Vol. V 871, 875). Dr. Grant administered a Stanford Binet Intelligence Scale - 5th edition test and determined Turner's full scale I.Q. is 108. (PC Vol. V 876, 877). Dr. Grant noted that there were no significant differences between Turner's verbal score of 109 and Turner's nonverbal score of 107. (PC Vol. V 876). Dr. Grant concluded that Turner's performance on the test "places his current intellectual/mental functioning above the level defined as mentally retarded by Florida Rule of Criminal Procedure 3.203(b)." (PC Vol. V 877). Dr. Grant's written report concluded that Turner's "current level of intellectual abilities" were "well within the average range of intelligence."

(PC Vol. V 877).

The State filed a motion for summary judgment, based on the experts' written reports, noting that both experts agreed that Turner was not mentally retarded. On July 22, 2009, the trial court held a hearing on the State's motion.

On September 14, 2009, the trial court summarily denied the motion based on the two experts' written reports. The trial court, in its written order, noted that one expert concluded that Turner's current I.Q. was 98 and the other expert concluded Turner's current I.Q. was 108. The trial court found Turner's intellectual functioning was normal. The trial court noted that under Florida law, a defendant must show he has an IQ of 70 or below. The trial court denied the request for an evidentiary hearing explaining that there was no need to address the other two prongs when the critical, threshold first prong had not been established. The trial court noted that there was "no factual dispute on the critical threshold first prong" and therefore, there was simply "no dispute that is of any legal consequence for this Court to resolve." The trial court concluded that the record, containing the two experts' reports, conclusively rebutted the claim of mental retardation.

On appeal, the Florida Supreme Court affirmed the trial court's summary denial. In an unpublished order, the Florida Supreme Court noted that the trial court had appointed two mental health

experts to examine Turner as required by Florida Rule of Criminal Procedure 3.203. The Florida Supreme Court observed that "[o]ne mental health expert determined that Turner's full-scale IQ was 98, and the other expert determined that Turner's full-scale IQ was 108." *Turner v. State*, 2010 WL 3802538 (Fla. September 28, 2010). The Florida Supreme Court noted that "[b]oth of these scores fell within the average intelligence range." The Florida Supreme Court concluded that "the expert reports conclusively rebutted the first-prong of Turner's *Atkins* claim." *Turner v. State*, 2010 WL 3802538 (Fla. September 28, 2010).

REASONS FOR DENYING THE WRIT

ISSUE

WHETHER THIS COURT SHOULD GRANT REVIEW OF A CLAIM THAT THE EIGHTH AMENDMENT MANDATES A PARTICULAR DEFINITION OF MENTAL RETARDATION IN A CASE WHERE THE CAPITAL DEFENDANT'S IQ IS NORMAL?

Petitioner Turner asserts that this Court should grant review of this case to determine whether the Eighth Amendment mandates a particular definition of mental retardation and when that determination should be made. The petition for writ of certiorari should not be granted. There is no conflict among courts of last resort on the actual

issue in this case which is whether this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) applies to a capital defendant with an IQ of 108. According to his own expert, Turner's IQ is 108. The expert recommended by Turner administered the Stanford Binet Intelligence Scale - 5th edition and determined that Turner's full-scale IQ was 108. Using the Stanford-Binet scale, two standard deviations below the mean results in an IQ score of 68. Turner's IQ on the Stanford-Binet scale, however, was 108. Turner's IQ is 40 points above the score for mental retardation. Turner's IQ is normal. No court has found the Eighth Amendment prohibits the execution of a capital defendant with a normal IQ. Moreover, while different states define mental retardation using different definitions, no court has held that a particular definition of mental retardation is constitutionally mandated. This Court in *Atkins* held that no particular definition of mental retardation was constitutionally mandated. Rather, this Court in *Atkins* left the definition of mental retardation to the states. The petition should be denied.

Florida law

In 2001, prior to this Court's decision in *Atkins*, the Florida Legislature enacted a statute prohibiting the imposition of a death sentence on a mentally retarded capital defendant. § 921.137, Fla. Stat. (2010); *see also Nixon v. State*, 2 So.3d 137, 141 (Fla. 2009)(summarizing the history of the applicable

statute and rule). That statute defined "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." § 921.137(1), Fla. Stat. (2010). The statute, in turn, defined the term "significantly subaverage general intellectual functioning," as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." § 921.137(1), Fla. Stat. (2010). After this Court's decision in *Atkins*, the Florida Supreme Court adopted a rule of criminal procedure, rule 3.203, governing capital defendants who are mentally retarded. *Hodges v. State*, - So.3d -, -, 2010 WL 4878858, 9 (Fla. December 2, 2010)(citing *Phillips v. State*, 984 So.2d 503, 509 (Fla. 2008). The rule also contained a definition of mental retardation. Fla.R.Crim.Pro. rule 3.203(b)(defining "significantly subaverage general intellectual functioning," as "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code."). The definition of mental retardation in the statute and the rule are "substantially similar." *Hodges*, - So.3d at -.

In Florida, a capital defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual

functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *Hodges*, - So.3d at - (citing *Nixon*, 2 So.3d at 141). As the Florida Supreme Court has noted, "Florida's definition of mental retardation is consistent with the APA's diagnostic criteria for mental retardation." *Franqui v. State*, - So.3d -, -, 2011 WL 31379, 7 (Fla. January 6, 2011).[1]

The Florida Supreme Court requires capital defendants to have an IQ below 71 to meet the first prong of Florida's test for mental retardation. *Nixon*

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[1] The American Psychiatric Association's standard reference text, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text Revision (2000) ("DSM-IV-TR"), provides the following clinical definition of mental retardation requires:

> A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test (for infants, a clinical judgment of significantly subaverage intellectual functioning).
> B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.
> C. The onset is before age 18 years of age.

DSM-IV-TR at 49.

v. State, 2 So.3d 137, 142 (Fla. 2009)(rejecting a claim that having a cutoff of below 71 is unconstitutional and reaffirming their prior decision in *Cherry v. State*, 959 So.2d 702 (Fla. 2007)). Under the terms of the statute, the "defendant has the burden to prove that he is mentally retarded by clear and convincing evidence." *Hodges*, - So.3d at - (citing § 921.137(4), Fla. Stat. (2005)). If a defendant fails to prove any of the three components, he or she will not be found to be mentally retarded. *Hodges*, - So.3d at - (citing *Nixon*, 2 So.3d at 142).

Turner's case

Turner has no standing to litigate the nuances of the definition of mental retardation because Turner is not retarded under any possible definition of mental retardation. Regardless of this Court's view of a bright-line cutoff, Turner's execution will not be prohibited by the Eighth Amendment. Turner is not injured by Florida's current definition of mental retardation. Turner has no personal stake in the outcome of the controversy. *Summers v. Earth Island Institute*, - U.S. -, 129 S.Ct. 1142 (2009) (holding environmental organizations did not have standing because the regulations did not affect the organizations and noting "the requirement of injury in fact is a hard floor of Article III jurisdiction."); *Burch v. Louisiana*, 441 U.S. 130, 132, n.4 (1979) (holding that one of the defendants who was convicted by a unanimous six-person jury lacked standing to raise a non-unanimous challenge to his conviction). Only a

defendant with a low IQ such that he could conceivably fall into the category of being mentally retarded depending on how the category is defined can possible have standing to raise the issue of bright-line cutoffs.

Turner is actually seeking an advisory opinion from this Court regarding a matter that will have no actual effect in his case. Any opinion from this Court regarding the proper definition of mental retardation would be advisory as to a defendant with a normal IQ such as Turner. This Court does not issue advisory opinions. *Clinton v. Jones*, 520 U.S. 681, 700, n.33 (1997)(observing that this Court "early and wisely determined that it would not give advisory opinions . . ."); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (explaining that when this Court reviews a state court decision, it is reviewing the judgment and if the resolution of a federal question cannot affect the judgment, there is nothing for the Court to do.); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)(observing that "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). Turner's petition for writ of certiorari presents an abstract legal issue that has no relevance to his particular case.

Conflict among the courts

Furthermore, the actual issue is splitless. There is no conflict between the Florida Supreme

Court's decision rejecting Turner's claim of mental retardation because both of his IQ scores "fell within the average intelligence range" and any other state court of last resort or federal court of appeals decision. *See* Sup. Ct. R. 10(b). Turner asserts there is "considerable controversy" among the courts regarding the propriety of using bright-line cutoffs in determination of mental retardation for purposes of *Atkins* but there is no controversy regarding the issue of whether a capital defendant with an IQ of 108 is mentally retarded. There is no controversy whatsoever regarding that matter. Turner does not cite a single case where the defendant's IQ was in the normal range yet a court held that *Atkins* applied to that defendant. The actual issue in this case is splitless.

Moreover, simple variations in the states' definition of mental retardation are not enough to establish conflict in this area. Recognizing a difference of opinion among various sources as to who should be classified as mentally retarded, this Court in *Atkins* left to the various states the task of defining mental retardation. *Atkins*, 536 U.S. at 317 (leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences."). This Court in *Atkins* reviewed the various state legislatures that had enacted statutes prohibiting the execution of the mentally retarded starting with Georgia in 1986 and including other states in the subsequent years. As part of that discussion, this Court observed that in

2000 and 2001, six more states, including Florida, had joined suit. *Atkins*, 536 U.S. at 313-315. This Court also noted that while the state's statutory definitions of mental retardation were "not identical," they generally conformed to the clinical definitions of mental retardation. *Atkins*, 536 U.S. at 317 n.22. As explained above, Florida was one of those states that already had a statute prohibiting the execution of mentally retarded capital defendants and a statutory definition of mental retardation at the time of this Court's decision in *Atkins*. Obviously, this Court realized when it left the definition to the states that there would be some differences between the various states' definitions. Basically, Turner is asking this Court to constitutionalize a particular definition of mental retardation which is exactly what this Court declined to do in *Atkins*. *See also Bobby v. Bies*, - U.S. -, 129 S.Ct. 2145, 2150 (2009)(noting, that the *Atkins* Court "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within *Atkins'* compass;" rather, that task was left to the States, in an Ohio case, which has a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70). There is no conflict with this Court's decision in *Atkins*.

The Florida Supreme Court observed that many other states also have similar cutoffs. *Cherry v. State*, 959 So.2d 702, 713 n.8 (Fla. 2007)(observing that "fourteen of the twenty-six jurisdictions with mental retardation statutes have a cutoff of seventy or two

standard deviations below the mean" citing *Bowling v. Commonwealth*, 163 S.W.3d 361, 373-74 (Ky. 2005)). Other state supreme courts have also affirmed their state's respective definitions of mental retardation that require IQ scores below a bright-line cutoff. *Miller v. State*, - S.W.3d -, 2010 WL 129708 (Ark. January 7, 2010)(rejecting a constitutional attack on Arkansas's definition of mental retardation, which requires an IQ score of 65 or below, and rejecting a contention that *Atkins* requires courts to recognize IQ scores up to 75 as qualifying as "entirely without merit."); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004)(concluding that to be considered mentally retarded, a defendant must have an I.Q. of seventy or below because the statute makes no reference to a standard error of measurement). A federal district court recently, in a federal Death Penalty Act prosecution, also employed a bright-line cutoff and required a showing of 75 or less for *Atkins* to apply. *United States v. Hardy*, 2010 WL 4909550, 5 (E.D.La. November 24, 2010)(finding as a factual matter, in a federal Death Penalty Act case, "that a diagnosis of mental retardation requires an IQ score of 75 or less on one of the standard IQ tests."). While other state supreme courts have rejected bright-line cutoff scores, those courts have not held that the Eighth Amendment requires a particular definition. Rather, those supreme courts have determined the test for mental retardation as a matter of state law as they are entitled to do under *Atkins*.

Turner's reliance on the district court's decision

in *Thomas v. Allen*, 614 F.Supp.2d 1257 (N.D.Ala. 2009), is misplaced. The district court in *Thomas* observed, in a couple of footnotes, that the Alabama Supreme Court's cutoff requiring an IQ score of below 71 was not found in the statute or the diagnostic criteria of either the AAMR or the APA. *Thomas*, 614 F.Supp.2d 1257 at n.13 & n.44. This is not a holding that employing a bright-line cutoff is unconstitutional. The district court also concluded that a court "must also consider the Flynn effect and the standard error of measurement in determining whether a petitioner's IQ score falls within a range containing scores that are less than 70." *Thomas*, 614 F.Supp.2d 1281. On appeal of that decision, however, the Eleventh Circuit, did not repeat this conclusion. *Thomas v. Allen*, 607 F.3d 749, 752 (11th Cir. 2010). Rather, the Eleventh Circuit stated that courts may consider the standard error of measurement and the Flynn Effect. *Thomas*, 607 F.3d at 753 (noting that the parties stipulated to a SEM of five points).[2] The Eleventh Circuit also

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[2] Here, two different experts performed two different types of IQ tests. The expert recommended by the State, administered the Wechsler Adult Intelligence Scales ("WAIS III"), and determined Turner's full scale I.Q. is 98. (PC Vol. II 202, 206-207). The expert recommended by the defense, administered the Stanford Binet Intelligence Scale - 5th ed. and determined Turner's full scale I.Q. is 108. (PC Vol. V 876, 877). The standard error of measurement (SEM) is employed more when dealing with a single IQ score generated by a single IQ test. The different, multiple IQ tests given by the experts in this case produce a range of 98 to 108. Additionally, the Flynn Effect is used to adjust IQ scores that are decades old. The two IQ tests given to Turner in this case were administered in 2008.

noted that "[a]lthough the *Atkins* Court alluded to clinical definitions propounded by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), it left to the states the development of standards for courts to employ in making a determination of whether an offender is mentally retarded" and looked to Alabama caselaw for the definition of mental retardation. *Thomas*, 607 F.3d at 752. Furthermore, the Eleventh Circuit endorsed Alabama's requirement that the capital defendant must establish that he was mentally retarded during three periods of his life: before the age of eighteen, on the date of the capital offense, and currently. *Thomas*, 607 F.3d at 753. Moreover, a federal district court is not a state court of last resort or a federal court of appeals. *See* Sup. Ct. R. 10(b).

Turner points to a single dissent to establish that the Eighth Amendment requires the rejection of any bright-line cutoffs. *In re Bowling*, 422 F.3d 434, 440-444 (6th Cir. 2005)(Moore, J., dissenting). However, Judge Moore's dissent did not conclude that Kentucky's bright-line rule was unconstitutional. Rather, the dissent felt the defendant had presented a viable claim of mental retardation because he may have scored 74 on one IQ test taken when he was a teenager and should be permitted to file a second or successive habeas petition to explore the issue further. The dissent is inapposite both factually and legally to

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These IQ scores are not decades old. Neither the SEM nor the Flynn Effect are significant in this case.

this case. And, obviously, dissents are not a proper basis to establish conflict under rule 10(b). *See* Sup. Ct. R. 10(b).

There is no conflict between the Florida Supreme Court's decision and any decision of this Court or any decision of any state court of last resort or federal court of appeals. There is no basis for granting certiorari review of this case. The petition should be denied.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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(2)

No. 10-847

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In The
Supreme Court of the United States

WILLIAM THADDEUS TURNER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

The respondent, the State of Florida (the "State"), argues that there was nothing wrong with the trial court's refusal to give Turner an opportunity to contest the accuracy and applicability of intelligence quotient ("IQ") tests administered by court-appointed experts[1] in July of 2008 (the "2008 IQ Tests"), because the court-appointed experts' determinations are indisputability accurate and applicable.

The State's argument is intellectually disingenuous and serves as a textbook example of *petitio principii* – circular logic, or begging the question – the logical fallacy in which the proposition to be proved is assumed without proof. Here, the propositions requiring proof (the State's various arguments that Turner was not entitled to an evidentiary hearing to determine whether the 2008 IQ Tests results were accurate or applicable) are all predicated on the faulty assumption that the 2008 IQ Tests were irrefutably

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[1] The State's response repeatedly and erroneously characterizes Dr. Daniel Grant, the court-appointed individual who examined Turner on July 17 and 18 of 2008, as Turner's "own expert." Brief in Opposition at 12. Yet, the trial court specifically held that "[Dr. Grant is] not the defense expert. . . . He's the court's expert. Both of these doctors are the court's experts, they're not yours, they're not confidential, they're not anything else. Okay." Supplemental Record on Appeal, Vol. I, pp. 18-19. The trial court explicitly and unequivocally held that Dr. Grant was the court's own expert. The relevant portion of the hearing transcript containing the trial court's statement is included in the appendix to this reply brief.

accurate and undisputedly applicable to the relevant analysis under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The State's argument is illogical. It highlights the Kafkaesque injustice that Turner faces: Turner seeks an evidentiary hearing to contest the applicability and accuracy of the court-appointed experts' determinations, and the court-appointed experts' determinations are presented by the State as an unassailable evidentiary barrier barring Turner's entitlement to an evidentiary hearing to thereby determine the validity of the court-appointed experts' determinations.

Based on this fundamentally flawed argumentative predicate, the State further asserts that Turner "has no stake" in challenging the accuracy and applicability of test results that undisputedly affect whether Turner will live or die. That is facially absurd – the assertion that a capital inmate sentenced to death does not have standing to challenge a ruling that is dispositive on whether the capital inmate can be constitutionally executed is plainly wrong.

Finally, the State completely fails to address Turner's second question presented for review or to address Turner's argument that the trial court and the Florida Supreme Court erred in focusing exclusively on the 2008 IQ Tests.

1. The State's Response Is Wholly Based on Circular Logic

All of the arguments contained in the State's response are crafted upon the same rotten logical foundation– that: (1) Turner's IQ was measured by court-appointed experts in 2008 at a certain level; (2) persons with IQ scores of that level are *per se* not mentally retarded under any definition of mental retardation; and thus (3) Turner's first ground in support of certiorari review fails because Turner cannot be mentally retarded pursuant to the 2008 IQ Tests. The State's argument assumes precisely the point that is at issue. Turner disputes the accuracy and the applicability of the 2008 IQ Tests and should be granted an evidentiary hearing to challenge the applicability and accuracy of the 2008 IQ Tests.

The State's very argument reinforces that Turner was wrongly denied an evidentiary hearing to challenge the 2008 IQ Tests. The only response offered by the State in support of denying Turner an evidentiary hearing is the blunt assertion that the 2008 IQ Tests were correct, and that Turner has no business questioning them – this cavalier and draconian approach to a life and death issue is entirely improper.

For well over 200 years this Court has flatly rejected arguments based upon circular logic. *See Carcieri v. Salazar*, ___ U.S. ___, 129 S. Ct. 1058, 1077 (2009) (noting that circular logic explains nothing and criticizing "relying on one definition to provide content to the other"); *United States v. Santos*,

553 U.S. 507, 515 (2008) (criticizing a "textbook example of begging the question"); *Dickerson v. United States*, 530 U.S. 428, 456 (2000) (criticizing "a classic example of begging the question [wherein the argument] assume[s] precisely the point at issue"); *Planned Parenthood of So. Pa. v. Casey*, 505 U.S. 833, 982 (1992) ("'reasoned judgment' does not begin by begging the question"); *Burd v. Smith*, 4 U.S. (4 Dall.) 76, 87 (1802) (criticizing an argument based upon *petitio principii*).

Here, the Court should reject the State's response in its entirety. It is wholly based upon circular logic, and it offers nothing to assist in this Court's reasoned judgment on whether to grant Turner's petition.

2. Turner Has a Personal Stake in the Outcome of this Controversy and Is Not Seeking an Advisory Opinion

The State argues that Turner does not have standing to litigate "the nuances of the definition of mental retardation because Turner is not retarded under any possible definition of mental retardation. . . . Turner is not injured by Florida's current definition of mental retardation. Turner has no personal stake in the outcome of the controversy." Brief in Opposition at 15.

As described above, this argument is based entirely on circular logic, and it completely ignores Turner's first question presented for review – whether *Atkins* and the Eight and Fourteenth Amendments to

the United States Constitution permit the Supreme Court of Florida's imposition of a bright-line requirement that a capital defendant must have an intelligence quotient of 70 or below *for the capital defendant to receive an evidentiary hearing to determine whether the capital defendant is mentally retarded.* Here, Turner was denied an evidentiary hearing to challenge the court-appointed experts' measurements.

The State analogizes Turner's situation to that in *Summers v. Earth Island Institute*, ___ U.S. ___, 129 S. Ct. 1142 (2009). In *Summers*, this Court addressed whether environmental organizations had standing to enjoin the United States Forest Service from enforcing regulations exempting certain land management decisions from the notice, comment, and appeal process. 129 S. Ct. at 1147-51. Turner's situation is not even remotely similar to that in *Summers* or any of the other cases cited by the State in support of their argument that Turner lacks standing[2] – Turner's life is literally at stake, and he has clearly suffered the type of "concrete and particularized injury that standing requires." *Id.* There is no "personal stake in the outcome of the controversy" greater than one's own life. *Id.* Contrary to the State's assertions, Turner does not seek an advisory opinion on an abstruse legal

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[2] *See, e.g., Burch v. Louisiana*, 441 U.S. 130, 132 n. 4 (1972) (holding that the petitioner lacked standing to challenge the constitutionality of the provisions of law allowing conviction by a nonunanimous six member jury because he had been convicted by a unanimous six person jury).

issue; he seeks an opinion on an issue that directly affects whether he can constitutionally be executed.

3. The State Has Inaccurately Described, and Articulated the Significance of, the Standard Error of Measurement and the Flynn Effect

The State's description, and analysis of, both the Flynn Effect and the standard error of measurement ("SEM") reflects a shocking misunderstanding of both concepts.

The State argues that "the Flynn Effect is used to adjust IQ scores that are decades old . . . These IQ scores are not decades old[, thus] the Flynn Effect [is not] significant in this case." Brief in Opposition at 20 n.2. That is just wrong.

The Flynn Effect "posits that IQ scores rise over time and that IQ tests that are not 're-normed' to adjust for rising IQ levels will overstate a testee's IQ." *Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005); *see also Wiley v. Epps*, 625 F.3d 199, 203 (5th Cir. 2010) (describing the Flynn Effect as "a phenomenon positing that, over time, standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population. Those who follow the Flynn effect adjust for it by deducting from the IQ score a specified amount for each year since the test was normalized"); *see generally* American Association on Intellectual

and Developmental Disabilities, *User's Guide: Mental Retardation* at 20-21 (10th ed. 2007).

Contrary to the State's assertion, the Flynn Effect is not tethered solely to the date of the measurement of an IQ score – it instead revolves around a comparison of the date that the IQ score was measured to the date that the IQ test that was used in the measurement was last normed.[3] Thus, the State's argument that the Flynn Effect is not significant is flatly – and embarrassingly – inaccurate.

Further, the State appears to argue that because the SEM "is employed more when dealing with a single IQ score generated by a single IQ test[,]" the SEM is not significant in light of the fact that Turner received two IQ tests in July of 2008. Brief in Opposition at 20 n.2. That too is wrong.

The SEM is "an index of the variability of test scores produced by persons forming the normative sample. In other words, the SEM is a statistical measure that allows the evaluator to know the amount of error that could be present in any test." *Thomas v. Allen*, 607 F.3d 749, 757-58 (11th Cir. 2010). The SEM

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[3] For example, if Turner's IQ score were measured today using an IQ test that was last normed thirty years ago, the Flynn Effect would obviously be significant, despite the fact that the IQ score is recent. But if Turner's IQ score was measured thirty years ago using an IQ test that was normed thirty years ago, the Flynn Effect would not be significant, despite the fact that the IQ score at issue is thirty years old. The State's ignorance of this basic principle of intelligence testing is appalling.

in no way becomes irrelevant when applied to two IQ tests – and, as pointed out by the State, the two tests administered to Turner were entirely separate IQ tests with separate SEMs (the Wechsler Adult Intelligence Scale and the Stanford Binet Intelligence Scale). *See, e.g.*, *Wiley*, 625 F.3d at 214-15 (noting that the SEM is applicable to multiple IQ scores, and applying the SEM to five separate IQ scores). The fact that two IQ tests were taken here does not negate the significance of the SEM.

4. The State Does Not Even Address Turner's Second Question Presented for Review

The only evidence upon which the trial court based its decision was the 2008 IQ Tests, which were administered 24 years after Turner's offense. Turner's second question for review is whether *Atkins* and the Eighth and Fourteenth Amendments to the United States Constitution require a court to determine whether a capital defendant was mentally retarded at the time of the capital defendant's offense, rather than at the time of the capital defendant's sentencing or execution. Yet, the State's entire argument is addressed solely to Turner's current IQ score.

Thus, the State has not addressed the fact that the Florida trial court and the Florida Supreme Court erred in focusing exclusively on the 2008 IQ Tests – rather than considering Turner's IQ at the time of his offense. Because this ground is adequately

addressed in Turner's petition, it will not be discussed further in this reply.

CONCLUSION

For the reasons set forth both above and in Turner's petition, this Court should grant certiorari in this case.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-1984-CF-6504-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

-vs-

WILLIAM T. TURNER

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

HEARING before the Honorable John Southwood, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 16th of June, 2009, before Karen B. Strollo, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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* * *

[16] provide a report from a witness that we did not intend to use.

THE COURT: Nobody has asked you to do anything. I didn't ask – there's nothing in this order

that says you have to file a report. It is ordered Dr. Grant has to file a report, very specific, shall submit a written report of their finding to both parties and this court, both doctors. And the order which set the dates for examination, each expert shall submit the written evaluation to the court with copies to – doesn't say anything about you have to do anything. But Dr. Grant has indicated that you have interfered with his willingness to file a report pursuant to the order of the court, is that right or wrong? Nobody asked you to file anything.

MR. LOHMAN: Well, I consider him to be the defense expert in the case.

THE COURT: Wrong, wrong. He's not the defense expert. He could be if that's what you want him to be. He's the court's expert. Both of these doctors are the court's experts, they're not yours, they're not [17] confidential, they're not anything else. Okay.

So how is it that Dr. Grant would not be required to follow this order, that's all I want to know.

MR. LOHMAN: The answer to that would be that pursuant to rule 3.203, certainly my understanding, that would be the operative authority for how this proceeds.

MR. NORBITZ: Your Honor –

THE COURT: Operative proceeding. Just one minute, I want one lawyer at a time, I can't have six lawyers arguing a motion, okay?

MR. NORBITZ: Okay.

MR. LOHMAN: Your Honor, we don't intend to have six lawyers arguing.

THE COURT: I know, but he raised his hand like he wants to participate and we're not going to do that, we're going to have one lawyer on any given thing. I'm not going to hear from everybody at one time.

Okay. So I still want to know why it is that Dr. Grant apparently based upon conversations that he had with you and Miss

* * *

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[49] CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen B. Strollo, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 27th day of July, 2009.

/s/ KAREN B. STROLLO
KAREN B. STROLLO, RPR